

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARGARITA EXIGA
Claimant

VS.

**COMFORT INN
SUPER 8 MOTEL**
Respondents¹

AND

ARGONAUT GREAT CENTRAL INS. CO.
Insurance Carrier

Docket No. 1,049,454

ORDER

STATEMENT OF THE CASE

Respondents and their insurance carrier (respondent) requested review of the April 8, 2010, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Christopher Cole of Wichita, Kansas, appeared for claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found the evidence established that it was more probably true than not true that claimant sustained an injury that arose out of and in the course of her employment with respondent. The ALJ also found that claimant provided respondent with timely notice of her accident.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 30, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent asserts the evidence shows that claimant did not injure herself at work on December 10, 2010, because she did not work that day. Respondent also contends

¹ Both respondents, Comfort Inn and Super 8 Motel, are owned by the same individual, Darlene Coffey, and claimant worked at both hotels.

that if claimant was injured earlier, it could mean that she did not give timely notice. Respondent argues that because the ALJ did not establish a date of accident, there was no basis for her finding that claimant gave respondent timely notice of her alleged accident.

Claimant argues that she sustained an accidental injury at work on either December 9 or 10, 2009, and that she immediately reported the injury to her employer, and then reported the accident a second time within 10 days of the accident. Accordingly, claimant asks that the ALJ's preliminary hearing Order be affirmed.

The issues for the Board's review are:

(1) Did claimant sustain an accidental injury that arose out of and in the course of her employment with respondent?

(2) If so, did claimant give respondent timely notice of her accident?

FINDINGS OF FACT

Claimant testified that she worked at both Comfort Inn and Super 8 Motel. She would work at the Comfort Inn in the morning and after she finished there, she would go to the Super 8 Motel and work. Comfort Inn and Super 8 Motel have the same owner, manager and assistant manager. Claimant had previously worked for respondent in 2008, but she left. She returned in the fall of 2009 and worked cleaning rooms, hallways and lobbies. As part of her job, she cleaned windows, mopped, swept and vacuumed. Claimant said she did not work on Fridays.

Claimant testified that she injured her right wrist on December 10, 2009.² She said she was injured on a Thursday because she was off the next day. Although records from respondent indicate that claimant did not work on December 10, 2009, she believes those records are incorrect. Respondent introduced claimant's time cards for the week of December 6, 2009. Those time cards, one for Comfort Inn and one for Super 8 Motel, showed claimant worked on December 9, 2009, and then was off until December 12, 2009. Claimant admitted she initialed both time cards.

On the day claimant was injured, she was using a heavy vacuum that required a lot of force to push. As she was vacuuming, a part of the vacuum came off. When she then pushed the vacuum forward, the vacuum did not move and her hand was bent backwards. Her wrist popped and she felt pain. Claimant said that her supervisor was Vivian Gonzalez, respondent's manager. However, Ms. Gonzalez was not working on the day of her injury. Claimant admitted she never reported her accident to Ms. Gonzalez. Claimant said a man named Mark was working as the front desk clerk that day, and she told him she

² Claimant's form K-WC-E1 Application for Hearing alleges a series of accidents beginning "12/10/09 and every working day thereafter." (filed Feb. 10, 2010).

had been injured immediately after the accident. She said that the front desk clerk would be the person to whom she would report an accident. Mark worked as a front desk clerk at both hotels. She testified that Mark told her not to worry about it because she had the next day off to rest and recover.

Claimant testified that she worked three jobs in both motels at the same time and sometimes does not know what day of the week it is. Because when she reported her accident to Mark he told her she did not have to work the next day, she thought she was injured on a Thursday. Claimant said she only worked for respondent a week or so after her injury.

Claimant testified that on December 19, 2009, she spoke with Hannah, respondent's assistant manager, and told her about the accident the past Thursday. Claimant said her hand was still swollen, but when she showed her hand to Hannah, Hannah commented that everyone has one hand thicker than the other. Hannah then sent an email to Darlene Coffey, respondent's owner. Ms. Coffey told Hannah to send claimant home and that respondent would call claimant later if she was needed. Claimant testified that as soon as she walked into her house, the phone rang. Hannah was on the phone. Hannah told claimant that respondent did not need her services anymore as they did not have work to offer her. Claimant said that the period of time between her accident and the time she spoke with Hannah was less than 10 days.

About a month after the injury, claimant contacted Ms. Gonzalez about seeing a doctor. Ms. Gonzalez arranged for claimant to be seen by Dr. John Winblad on January 22, 2010. Dr. Winblad examined claimant's wrist, had x-rays taken, and prescribed a splint. Claimant later received a call from the doctor's office telling her the x-rays showed that she had fractured her right wrist.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁵

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

³ K.S.A. 2009 Supp. 44-501(a).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁵ *Id.* at 278.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁷

ANALYSIS

Date of accident is not a jurisdictional issue on an appeal from a preliminary hearing order. To the extent that a date of accident determination is necessary to resolve the jurisdictional issue of notice, there is no evidence that claimant's accident occurred before December 9, 2009. This Board Member finds that claimant suffered a single accident, not a series of accidents. That accident occurred at work while claimant was performing her regular job duties on either December 9 or December 10, 2009. She testified that she reported her injury to the front desk clerk, Mark, on the same day that her accident occurred. Claimant said that it was her understanding that Mark was a person who was authorized by her employer to receive notice of an accident. There is no contrary testimony. Furthermore, whether the accident occurred on December 9 or December 10, 2009, the notice claimant gave to Hannah on December 19, 2009, was also timely.

⁶ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁷ K.S.A. 2009 Supp. 44-555c(k).

CONCLUSION

(1) Claimant has met her burden of proving she sustained personal injury by accident on either December 9 or December 10, 2009, that arose out of and in the course of her employment with respondent.

(2) Claimant gave respondent timely notice of her accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated April 8, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Christopher Cole, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge